

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-2101

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JAMES W. COUNTS,

Petitioner-Appellant,

-against-

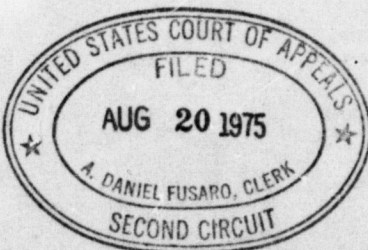
UNITED STATES OF AMERICA,

Respondent-Appellee.
-----X

B
P/S
Docket No. 75-2101

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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PAGINATION AS IN ORIGINAL COPY

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JAMES COUNTS vs. UNITED STATES OF AMERICA

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

FILED
U.S. DISTRICT COURT S.D.N.Y.
NOV 18 1972
CLERK

-against-

73-1-857

JAMES RICHARD COVIELL,

Defendant.

----- X

U. S. Courthouse
225 Nassau Street, 18th
Floor, New York

June 16, 1972
10:00 o'clock, a.m.

B E F O R E:

HON. GEORGE ROSLING,

U. S. D. J.

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

Leo Lashkin
Official Court Reporter
U. S. District Court

LEO LASHKIN

ACTING OFFICIAL COURT REPORTER

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A P P E A R A N C E S :

ROBERT H. MORSE, ESQ.,
UNITED STATES ATTORNEY,
EASTERN DISTRICT OF NEW YORK.

BY: EMANUEL MOORE, ESQ.,
of Counsel.

BERT NISONOFF, ESQ.,
Attorney for Defendant.

* * * *

THE CLERK: United States of America versus James Richard Counts for sentencing.

Mr. WISONOFF: Your Honor, may I have the probation report?

THE COURT: No. All proceedings must be conducted in a criminal case before the defendant present.

Second call.

You will have it in plenty of time to go over it.

Mr. WISONOFF: Thank you, Your Honor.

THE CLERK: Second call.

* * *

THE CLERK: United States of America versus James Richard Counts for sentencing.

Second call.

(Defendant approaches the bench with his attorney.)

THE COURT: You are James Counts?

THE DEFENDANT: Yes.

THE COURT: And your attorney, Mr. Fort Wisonoff --

MR. WISONOFF: Yes, sir.

THE COURT: (Continuing) -- stands beside you. Mr. Emanuel Moore appears for the Government.

MR. MOORE: Yes, sir.

THE COURT: Sentence is about to be imposed upon you, or will be rather, later in the morning, upon your conviction after trial for robbery.

It is the Court's practice before sentence is imposed to make available to the defendant the Probation Department report which has been turned over to the Court by the department.

Inasmuch as this is the only copy the Court has (indicating), the Court turns it over directly to the attorney expecting to receive it back from him when it has served the purpose. However, the report is available to you for such proper use as you wish to make of it, including reading it in its entirety, discussing it with your attorney and otherwise availing yourself of this report (handing to Mr. Wisonoff).

MR. WISONOFF: Thank you, Your Honor.

* * *

THE COURT: This is James Counts, his

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2 THE COURT: (Cont'g) attorney, Mr. Bert
3 Nisonoff and Mr. Emanuel Moore appears for the
4 Government.

5 The Probation Department report has been
6 returned to me. I understand that motions were re-
7 served to the date of sentencing. Proceed.

8 MR. NISONOFF: Yes, Your Honor.

9 With respect to the defendant, James
10 Counts, the application is made to set aside the
11 verdict of the jury on the ground the evidence be-
12 fore them presented by the Government was insuffi-
13 cient and incredible as a matter of law and did not
14 prove his guilt beyond a reasonable doubt.

15 I suggest to Your Honor the only testimony
16 as to that, appeared at the trial of this defendant
17 was an eye witness identification made by Chief Petty
18 Officer Byers, made of a man he had never seen be-
19 fore or seen since for a period perhaps of five to
20 ten seconds in a darkened hotel room, the only light
21 being afforded by -- from a bathroom in the front of
22 the room in addition to which, at the time he was al-
23 leged with his co-defendant and there was some phy-
24 sical evidence that was taken from the place of ar-
25 rest, but both men were there and the physical

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2 MR. WISONOFF: (Cont'g) evidence was not
3 taken from the possession of this defendant.

4 I suggest to Your Honor that the identifi-
5 cation of this defendant was extremely weak and as
6 shown by Agent Mitchell -- I think Mitchell Phillips.

7 THE DEFENDANT: Phillips.

8 MR. WISONOFF: Agent Mitchnell's complaint
9 at the time of the defendant's arrest, in which the
10 defendant, Elan was positively identified, but no
11 statement was made about the identification of the
12 defendant, Counts. The testimony was weak and I
13 would ask Your Honor, based upon the fact that
14 identification testimony is obviously one of the most
15 perplexing principles facing the courts in a trial
16 where a question of fact has to be determined by
17 juries and we know we have legal defenses and writ-
18 ings based on the difficulty of proper identification
19 and sound identification and I believe, frankly,
20 Your Honor, that this entire case stands or falls on
21 the identification made by Chief Myers and I suggest
22 to Your Honor, the identification was not founded
23 upon a sufficient look at the man in this matter, or
24 the man who was with the defendant, Elan, at the
25 time the crime was committed.

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2 MR. WISCHOFF: (Cont'g) Your Honor may
3 recall there was some sort of a spray sprayed in
4 Byer's eyes and that the two men broke through a
5 motel door, pushed it open and knocked Byer back
6 past a lighted area into the darkened motel room;
7 that most of the time, Byer had sheets over his head
8 and I submit to Your Honor that the length of time
9 was not more than between five and ten seconds and
10 to be able to make the identification as he said, as
11 did later on -- "I was not able to make it to Mitch-
12 ell earlier. I did not get a good look" and his
13 testimony was incredible as a matter of law.

14 THE COURT: I deny the motion. It was a
15 question of fact for the jury and I have little doubt
16 on my own that they had the right defendant.

17 MR. WISCHOFF: I respectfully except.

18 THE COURT: (Indicating defendant.) Is he
19 the fellow the detective saw drop the thing out of
20 the window?

21 MR. WISCHOFF: Yes, sir.

22 THE COURT: He's the one. The Sky Marshalls
23 cannot stay there.

24 MR. WISCHOFF: Yes, Your Honor.

25 THE COURT: They will have to do until

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2 THE COURT: (Cont'g) something better
3 comes along.

4 MR. NISONOFF: There was some contradiction
5 in the testimony as to whether or not it could have
6 even been this man who tossed the bag out the window,
7 as testified to by the officers -- where he was
8 standing and whether the window was opened?

9 THE COURT: Continue.

10 MR. NISONOFF: As I indicated, there was
11 a contradiction between the testimony of the officers,
12 the one who came in through the window, who indicat-
13 ed the position this was in and then arrested him.
14 It would have been impossible for him to drop the
15 bag out the window, although there was testimony he
16 had seen this man drop it out of the window. I mere-
17 ly want to point it out to Your Honor.

18 The defendant respectfully excepts to
19 Your Honor's ruling.

20 THE COURT: All right.

21 Before the Court imposes sentence, the
22 Court is required, Mr. James Counts, to afford you
23 an opportunity to address the Court, the idea and
24 purpose being to persuade the Court to mitigate the
25 punishment which you face. You may speak or you may

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2 THE COURT: (Cont'g) have your attorney
3 speak for you, or if it is your desire, you may ask
4 your attorney be permitted to speak and that, of
5 course, will be granted.

6 Do you wish to speak or do you wish your
7 attorney to speak for you?

8 THE DEFENDANT: I leave it up to my
9 attorney.

10 THE COURT: You have asked your attorney
11 be permitted to speak. When he has concluded, I will
12 ask you if there is anything you wish to add.

13 Go ahead, Mr. Nisonoff.

14 MR. NISONOFF: Thank you, Your Honor.

15 I have read the Probation Department re-
16 port and I have read the summary of it to the defen-
17 dant and I have found in it no recommendation or
18 indication, one way or the other, as to the defend-
19 ant's background and family, other than to say that
20 he has been arrested on a number of occasions, is
21 presently serving a rather lengthy indeterminate
22 sentence of up to ten years imposed upon him on
23 March 15th by Mr. Justice Smith in the County of
24 Queens.

25 THE COURT: He is serving that presently?

1
2 MR. NISONOFF: That's right and there were
3 some other arrests. I represented him on some of
4 those.

5 THE COURT: Is that sentence after trial
6 or a plea of guilty?

7 MR. NISONOFF: After trial; as a matter
8 of fact -- No. I'm mistaken. That matter is also
9 being appealed, if Your Honor please. The defendant
10 is serving a zero to ten in the State penitentiary,
11 State Department of Correction. He stands before
12 Your Honor convicted of participating in a crime of
13 violence, although he, himself, apparently did not
14 commit any of the violence.

15 From my recollection of the testimony, I
16 believe that my recollection was he was the man who
17 was in the room with Elan and did not participate in
18 any of the violence itself.

19 The defendant is 21 years of age, Judge.
20 Your report indicates to me that they did obtain the
21 fact that he was working for the Tow Lift Company,
22 which is father worked for the past twenty years.
23 His mother (indicating) is in court. He comes from
24 one of the loveliest families I have had the pleasure
25 of encountering and it is my intention to ask the

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2 MR. WISONOFF: (Cont'g) Court for two
3 things. One is for as much mercy as the Court can
4 see fit under the circumstances of this case, for
5 the reason that the defendant is already serving a
6 zero-to-ten-year sentence and is a young man.

7 I have never found personally and I still
8 don't believe that jail ever serves a rehabilitative
9 purpose. It does serve a punitive purpose. I am
10 not certain as to its deterrent ability. While he
11 was in, it does; but as to whether it deters him
12 when he comes out, or whether he learns to be a
13 better citizen, I don't know. The only purpose it
14 serves in punishment: nothing else.

15 I would ask Your Honor to do this, - be as
16 lenient as possible on this young man. He does have
17 two other charges pending against him in Queens
18 County.

19 THE COURT: Can I be lenient?

20 MR. WISONOFF: That is possible, assuming
21 that -- The problem is this, which I am now going to
22 ask Your Honor to run any sentence, any sentence con-
23 currently with the sentence that was imposed upon
24 him in the State Court. It is possible, as I under-
25 stand the law of sentencing, for a Federal sentence

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2 MR. NISONOFF: (Cont'g) to run concurrently
3 with a State sentence, but it is not possible the
4 other way around: in other words, he can do his
5 Federal time in a State prison, but he cannot do his
6 State time in the Federal prison. Whatever may hap-
7 pen in the other two cases, - and I am not convinced
8 he will be found guilty in either one, we have the
9 preliminary assumption and I am familiar with some
10 of the facts and I don't want to go into them now.

11 THE COURT: I held the trial of this case.
12 I don't need any other sentencing to persuade me
13 what to do.

14 MR. NISONOFF: All right. I will ask Your
15 Honor to run concurrently with the sentence imposed
16 by Mr. Justice Smith on March 15, 1972, in the State
17 Court of the County of Queens.

18 THE COURT: Have you completed?

19 MR. NISONOFF: Yes, Your Honor.

20 THE COURT: (To the Defendant) Do you wish
21 to add anything?

22 THE DEFENDANT: No.

23 THE COURT: Mr. James Counts. You were
24 found guilty by a jury verdict of a one-count indict-
25 ment, 70 Cr 277, of, well, robbery of a sky marshal,

1
2 THE COURT: (Cont'g) which could be a short
3 description of it although actually the charge was
4 stealing by force and violence Federal Government
5 property.

6 The sentence of the Court upon such conviction
7 is as follows: I sentence you to the custody
8 of the United States Attorney General, or authorized
9 representative, who shall designate the place of your
10 confinement, for the term of Ten Years following
11 your present imprisonment in the State penal institution.
12

13 THE CLERK: That is, upon the completion
14 of the State

15 THE COURT: To follow the completion of
16 the State prison sentence.

17 MR. WISLOFF: I respectfully except to
18 Your Honor's judgment.

19 THE COURT: In other words, if he should
20 be paroled before the first expiration of his State
21 sentence, the term of Ten Years will start with the
22 beginning of his parole. If he serves out his full
23 time, it will follow his full term imposed by the
24 State Court. I think that is academic in view of
25 his current confinement.

THE COURT: (Cont'g) (To Mr. Nisonoff)

You can renew your current application in the cases of disposition of the State.

Defendant remanded.

I have to advise the defendant. I constantly keep forgetting. I have to advise the defendant under Rule 32A.

(To Mr. Nisonoff) You are assigned counsel?

MR. NISONOFF: I am retained.

THE COURT: Retained counsel.

(To the Defendant) The Court is required under Rule 32A(2) of the Federal Rules of Criminal Procedure, to notify you as follows: After imposing sentence in case which has gone to trial on a plea of not guilty, and this is such case, the Court shall advise the defendant, and he does so advise of his right to appeal and of the right of the defendant who is unable to pay the cost of the appeal, to apply for leave to appear in forma pauperis.

Further, if the defendant requests, the Clerk of the Court is prepared to file forthwith a Notice of Appeal on behalf of the defendant. First of all, the Notice of Appeal must be filed within Ten Days after the signing by this Court of the

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2 THE COURT: (Cont'g) Judgment of Convic-
3 tion which, in all likelihood, will be signed today.

4 If you wish, I will instruct the Clerk of
5 the Court to file a Notice of Appeal forthwith so
6 that you may be assured that this proceeding has
7 been taken care of.

8 THE DEFENDANT: Yes.

9 THE COURT: All right.

10 Mr. Celardi, I instruct you immediately
11 upon the filing of the Judgment of Conviction, to
12 file a Notice of Appeal on the defendant's behalf.

13 THE CLERK: Yes, Your Honor.

14 THE COURT: (To Mr. Simonoff) What is the
15 situation with respect to his financial status?

16 MR. SIMONOFF: Well, if Your Honor please,
17 I have been retained and will continue to represent
18 the defendant through the two trials in Queens.

19 However, on the appeal from the Queens
20 judgment and this judgment, I believe the defendant
21 will require the legal aid services.

22 THE COURT: Do you wish the Court to swear
23 the defendant and to have the application considered
24 in whole?

25 THE DEFENDANT: Yes, Your Honor.

THE COURT: As to his eligibility to appear in forma pauperis?

MR. NISONOFF: Yes, sir.

THE COURT: All right.

(To the Clerk) Swear the defendant.

JAMES RICHARD COUNTS, being duly sworn by the Clerk of the Court, was examined and testified, as follows:

THE COURT: What is your full name?

THE DEFENDANT: James Richard Counts.

THE COURT: You are presently confined where?

THE DEFENDANT: Four -twenty-seven West Street, at the present time.

THE COURT: That is by writ of habeas corpus.

Where are you serving time?

THE DEFENDANT: They haven't given me any place yet.

THE COURT: (To Mr. Nisonoff) Has he been here --

MR. NISONOFF: Because this case was pending during the period of the time of the other case.

THE COURT: Has he begun to serve the

1 THE COURT: (Cont'g) State sentence?

2 THE DEFENDANT: Not yet.

3 MR. NISONOFF: Did you come here from West
4 Street?

5 THE DEFENDANT: Yes.

6 MR. NISONOFF: He stated he was at Sing
7 Sing for three days and brought here --

8 THE COURT: By a writ?

9 MR. MOORE: Yes. I have a writ here.

10 THE COURT: The Sing Sing sentence was in-
11 terrupted by the writ of habeas corpus.

12 MR. MOORE: That is correct, Your Honor.
13 That is my understanding.

14 THE COURT: (To the Defendant) What prop-
15 erty do you have? Do you have any real or personal
16 property of any kind?

17 THE DEFENDANT: No, I don't.

18 THE COURT: Well, of course you have no em-
19 ployment, which would start only if you were released
20 by the State Court.

21 THE DEFENDANT: Yes.

22 THE COURT: Do you have any assets of any
23 kind whatsoever?

24 THE DEFENDANT: No.
25

1 THE COURT: All right.

2 I find the defendant is eligible to proceed
3 in forma pauperis and make that decision.
4

5 (To Mr. Nisonoff) Do you have the minutes
6 of the trial?

7 MR. NISONOFF: I haven't ordered them,
8 Judge.

9 THE COURT: Didn't you receive a copy dur-
10 ing the course of the trial?

11 MR. NISONOFF: No. That is not my recol-
12 lection and the only thing I have were the Grand
13 Jury minutes and I turned them over to Mr. Moore
14 this morning.

15 THE COURT: What did I do? Did I make my
16 copy available?

17 MR. NISONOFF: Yes. I came in early on a
18 Saturday or Monday morning to read them for purposes
19 of summation.

20 THE COURT: All right.

21 I will sign whatever, what is required.

22 It is your duty as retained counsel to
23 bring to the Court's attention the various steps you
24 contemplate taking, which will require the outlay of
25 money, except for the fact that the defendant has

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2 THE COURT: (Cont'g) been found to be
3 eligible under forma pauperis.

4 MR. NISONOFF: I was under the impression,
5 Your Honor, the Legal Aid Society will handle the
6 appeal.

7 THE COURT: No, I didn't do that and under
8 our statute, you continue in following these pro-
9 ceedings up to the point where the Court of Appeals
10 would, upon your application, relieve you.

11 MR. NISONOFF: I am a little confused now,
12 Judge.

13 If this defendant has now been assigned,
14 or declared to be a pauper and eligible to represen-
15 tation under Federal Practice Rules, it was my under-
16 standing, perhaps misunderstood, that the Legal Aid
17 Society would be handling that and I would, at this
18 time, ask to be relieved.

19 THE COURT: I can't do that. I think it
20 lies with the Court of Appeals.

21 MR. NISONOFF: I will make an application
22 there.

23 THE COURT: Do it and if they refer you
24 back to me, I will make the appropriate disposition.
25 You are on the list.

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2 MR. WISNIOFF: Yes, the U.C.J.A. list.

3 THE COURT: Is there a special reason?

4 MR. WISNIOFF: No. I have a rather af-
5 firmative feeling for this young man but, at this
6 point, I am involved in a number of appeals based
7 upon assigned appeals, and one of which is over
8 four thousand pages of trial record and I am bogged
9 down in it and it is supposed to be a mental appeal
10 in this coming period of time and I do not like at
11 this point to get myself bogged down.

12 THE COURT: All right. In all events,
13 make your application to the Court of Appeals.

14 MR. WISNIOFF: I will do that, sir.

15 THE COURT: If they refer you back here,
16 I will dispose of your application, or if I am not
17 immediately available, I'm sure Judge Mishler, as
18 Chief Judge, will attend to it himself, or assign
19 somebody else.

20 THE CLERK: Is execution stayed pending ap-
21 peal, or is defendant remanded?

22 THE COURT: He is remanded.

23 THE CLERK: He is remanded.

24 THE COURT: Yes.

25 MR. WISNIOFF: During the period of time

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2 MR. WISNIOFF: (Cont'g) he was at West
3 Street, I don't know whether or not he would be giv-
4 en any credit towards his State sentence. In view
5 of that fact, I would ask that.

6 THE COURT: Whichever way it works out, so
7 that he doesn't receive double credit the Court in-
8 tends the application be made if the State sentence,
9 which is the one currently pending, is reduced by
10 the time he spent in West Street which, I think, it
11 will be, he will not receive credit. It isn't by
12 my action. It is by statute he will not receive
13 credit for his stay in West Street. If, on the other
14 hand, he doesn't receive State credit, he surely will
15 receive Federal credit, or upon a showing that he is
16 not receiving credit in either place, you make your
17 application under Rule 35 and I will enter an order
18 requiring he receive credit, because it is my inten-
19 tion he receive credit for all prison time.

20 MR. WISNIOFF: Thank you very much.

21 THE DEFENDANT: Excuse me.

22 (Defendant speaks with Mr. Wisnoff.)

23 MR. WISNIOFF: Your Honor, may the defend-
24 ant have a visit with his mother?

25 THE COURT: Very good, Mr. Wisnoff.

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2 THE MARSHALL: No, sir.

3 THE COURT: All right.

4 The defendant is remanded.
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44 A.D.2d 841

The PEOPLE, etc., Respondent, v. Jimmy COUNTS, a/k/a James
Counts, Appellant.

Supreme Court, Appellate Division, Second Department.

May 20, 1974.

Defendant was convicted before the Supreme Court, Queens County, of criminally selling a dangerous drug in third degree, and he appealed. The Supreme Court, Appellate Division, held that totality of evidence failed to establish defendant's guilt beyond reasonable doubt.

Conviction reversed and indictment dismissed.

1. Drugs and Narcotics ⇐ 119

In prosecution for criminally selling dangerous drug in third degree which allegedly occurred after undercover policewoman entered defendant's apartment, totality of evidence failed to establish defendant's guilt beyond reasonable doubt. CPL 470.20, subd. 5.

2. Criminal Law ⇐ 182

Defendant's contention that prosecutor's improper question was designed to compel a mistrial and thus avoid an acquittal was required to be rejected, where prosecutor vigorously opposed defendant's application for mistrial and introduced no new evidence at retrial.

Before HOPKINS, Acting P. J., and MARTUSCELLO, LATHAM,
COHALAN and BENJAMIN, JJ.

MEMORANDUM BY THE COURT.

Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered March 15, 1972, convicting him of criminally selling a dangerous drug in the third degree, after a nonjury trial, and imposing sentence.

Judgment reversed, on the law and the facts, and indictment dismissed.

Defendant's conviction must be reversed and the indictment dismissed because the trial court's verdict was against the weight of the evidence (CPL 470.20, subd. 5).

On the morning of September 24, 1971 defendant was sentenced to a conditional discharge following his conviction of the crime of possession of narcotics. That very evening an undercover policewoman allegedly went to defendant's apartment, never having seen or dealt with him before, and purchased a "spoon" of heroin from him for \$30. That "spoon" of heroin was placed into a glassine envelope. Various

members of her backup team testified that from their vantage point on the street they had observed the undercover officer enter defendant's apartment. No testimony was offered to explain why such a purchase was attempted.

An analysis of the evidence adduced at the trial convinces us that defendant's guilt was not established beyond a reasonable doubt. The glassine envelope allegedly purchased from defendant weighed only eight grains and was what is referred to in the narcotics trade as a "nickel bag" which should have sold for between \$2 and \$8.

The undercover agent testified that she had been in defendant's presence for about 15 minutes and that he had been barechested that entire time. There were two other couples in the apartment who appeared to be under the influence of narcotics. When the officer entered the apartment, defendant was allegedly engaged in putting white powder into tinfoil envelopes. He simply asked the officer how much she wanted and then packaged it for her. The officer testified that she had not observed any distinguishing marks on defendant's body, except he might have had a "track" or a scab on his left arm. She did not see any bullet wounds on his chest.

During defendant's testimony he removed his shirt and the following scars were observed by the trial court: a 5-inch scar behind the right forearm; a 3- or 4-inch scar on the right arm toward the crease of the elbow; two scars about 1 to 1½ inches long on the left arm; a 2½-inch scar proceeding diagonally down from the left nipple; and another scar on the chest about the size of a dime. The evidence established that all of these scars had been present prior to the time of the alleged sale.

The defense was alibi. Defendant, his parents and his wife, from whom he was then separated, all testified that he was at his parents' home celebrating his mother's birthday at the time of the alleged sale. His mother testified that she had taken the night off from her employment in the hospital as a nurse in order to attend the party. After a check of the hospital records, the People stipulated that defendant's mother had not reported to work on the night in question.

Defendant's wife, who was seeking a divorce and therefore had no reason to supply him with a false alibi, corroborated the alibi and contradicted the testimony of the police witnesses that there was a direct view of defendant's apartment door from the street.

[1] Based upon all of the foregoing, we find that defendant's guilt was not established beyond a reasonable doubt.

A mistrial was declared following the posing of an improper question by the prosecutor which tended to show that defendant had previously been in jail. The trial was thereafter resumed without a jury on the testimony already in the record.

[2] In view of the fact that the prosecutor vigorously opposed defendant's application for a mistrial and introduced no new evidence at the retrial, we reject defendant's contention that the prosecutor's improper question was designed to compel a mistrial and thus avoid an acquittal (see *United States v. Beasley*, 5 Cir., 479 F.2d 1124; see, also, *United States v. Jorn*, 400 U.S. 470, 485, n. 12, 91 S.Ct. 547, 27 L.Ed.2d 543; *United States v. Tateo*, 377 U.S. 463, 468, n. 3, 84 S.Ct. 1587, 12 L.Ed.2d 448).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES COUNTS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

74-C-1593

BARTELS, D.J.

MEMORANDUM-DECISION and ORDER

Petitioner James Counts, after his conviction for robbery of a sky marshal, was sentenced by the late Judge Rosling of this Court on June 26, 1972, to a term of ten years, to commence after completion of his then current state sentence. He now moves, pursuant to 28 U.S.C. §2255, to vacate his sentence on the ground that it was based in part on a state conviction which was subsequently reversed by the New York state courts. He maintains that he should be given credit for the time served under the invalid state conviction.

This Court served on the panel which passed on petitioner's sentence and has examined the minutes of his

sentence and is familiar with the basis for that sentence. Both petitioner and his co-defendant were sentenced to ten years, to run consecutively to the state conviction that each was then serving. Petitioner has a criminal record beginning from the time he was a minor and ending on the date of this sentence. At the time of the imposition of this sentence, petitioner had been sentenced by the state court to a maximum term of ten years for the sale of heroin and there was also pending before the state court a charge of attempted murder and robbery in the first degree. He could have been sentenced by Judge Rosling to a maximum term of fifteen years. At the time of sentencing Judge Rosling considered, according to the minutes, the fact that petitioner was currently in custody under a state sentence. The state sentence played no part in Judge Rosling's sentence of petitioner ^{which} ~~but~~ was based upon the nature of the crime for which he was convicted in this Court, and the intention was to impose a sentence of at least ten years. Therefore, there is no need for re-sentencing under the holding of United States v. Tucker, 404 U.S. 443 (1972).

Petition denied. SO ORDERED.

Dated: Brooklyn, N.Y.,
November 27, 1974.

John R. Burtels
United States District Judge

Certificate of Service

AUG 20 1975
_____, 19

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York.

E. Thomas Doyle